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CASES CITED.

STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellants, *v.* ABILENE & SOUTHERN RAILWAY COMPANY, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, et al.	No. 456.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.[1]

Holding that the record of the evidence before the Interstate Commerce Commission was an empty record, the District Court (Circuit Judge Lewis and District Judge Symes concurring, Tr. 35, and District Judge Kennedy dissenting, Tr. 48) annulled and permanently enjoined for lack of any evidence to support it (288 Fed. Rep. 102) (Tr. 55) the order of

[1] The pleadings, court proceedings, and appeal papers were printed by the Clerk of this Court and will be referred to as the transcript, thus, "Tr. 4." The record of the evidence and proceedings before the Commission is separately printed and will be referred to as Commission Record, thus, "Com. Rec. 8."

the Interstate Commerce Commission which increased the divisions of the Kansas City, Mexico & Orient Railroad Company (William T. Kemper, Receiver).

Under Transportation Act, 1920, Ch. 91, Sec. 418, 41 Stat. 456, 486, amending Interstate Commerce Act, Sec. 15 (6), the Interstate Commerce Commission, upon consideration of an application filed on behalf of the company (Com. Rec. 63), instituted an inquiry particularly to determine whether or not "the division of joint rates, fares, and charges on traffic interchanged between the said applicants and other carriers subject to the Interstate Commerce Act are unjust, unreasonable, inequitable, or unduly preferential or prejudicial, within the meaning of paragraph (6) of section 15 of said act; and if so, the just, reasonable, and equitable divisions thereof that should be received by the several carriers."

Forty trunk line railway companies (Com. Rec. 64) were named as respondents, comprising all of the principal lines serving the territory west and southwest of Chicago (Com. Rec. 395). Thirteen of these trunk lines have connections[2] with the Orient

[2] The connections of the Orient with the trunk lines are as follows: Missouri Pacific at Wichita and Anthony, Kans.; Chicago, Rock Island & Pacific at Wichita and Anthony, Kans., and Clinton, Oklahoma; Atchison, Topeka & Santa Fe at Wichita and Anthony, Kans.; St. Louis-San Francisco at Wichita, Kans., Clinton and Altus, Oklahoma; Midland Valley at Wichita, Kans.; Clinton & Oklahoma Western at Clinton, Oklahoma; Wichita Falls & Northwestern at Altus, Oklahoma; Fort Worth & Denver City at Chillicothe, Texas; Missouri, Kansas & Texas of Texas at Hamlin, Texas; Abilene & Southern at Hamlin, Texas; Texas & Pacific at Sweetwater, Texas; Gulf, Colorado & Santa Fe at Sweetwater and San Angelo, Texas; Galveston, Harrisburg & San Antonio at Alpine, Texas.

(Com. Rec. 397), but its principal witness testified, "we have no friendly connections" (Com. Rec. 93), and it was alleged that in many instances "where divisions have been established by its connections on an arbitrary basis these connections have declined to shrink their arbitraries when the through rates have been reduced." (Tr. 17.)

On May 15, 1922, the hearing before the Commission commenced. (Com. Rec. 69.) The case was submitted on May 16, 1922. Counsel for the trunk-line connections of the Orient Company rested the case on the examination and the cross-examination of witnesses who produced certain exhibits and testified on behalf of the Orient Company. Certain other exhibits containing statistical information furnished by the trunk-line connections at the request of the Commission made before the hearing were also filed. At the close of the examination of the witnesses counsel for the trunk lines stated, "The respondents have no evidence to offer in this proceeding." (Com. Rec. 258). The case was submitted by all of the parties without briefs or oral argument. (Com. Rec. 262, 263.)

On August 9, 1922, nearly three months later, the Commission filed its report (Tr. 9) and entered its order (Tr. 3) wherein and whereby the Commission ordered (Tr. 4) "That on and after September 15, 1922, the divisions of interstate joint rates received by Abilene & Southern Railway Company * * * hereinafter termed the connecting lines, on freight traffic interchanged with the Kansas City, Mexico &

Orient Railway Company and its receiver, and the Kansas City, Mexico & Orient Railway Company of Texas, and their successors, hereinafter termed the Orient, shall not exceed the following percentages of the divisions accruing on such traffic to said connecting lines, respectively:" Abilene & Southern, 85%; (*a*) Atchison, Topeka & Santa Fe, (*b*) Galveston, Harrisburg & San Antonio, and (*c*) Wichita Falls & Northwestern, 75%; (*a*) Chicago, Rock Island & Pacific, (*b*) Midland Valley, (*c*) Missouri, Kansas & Texas, (*d*) Missouri Pacific, (*e*) St. Louis-San Francisco, (*f*) Texas & Pacific, 80%; (*a*) Fort Worth & Denver City and (*b*) Gulf, Colorado & Santa Fe, 70%; Clinton & Oklahoma Western, 90%.

Divisions of joint rates applicable to traffic as to which the Orient is an intermediate carrier shall be adjusted by the connecting lines on relative basis of proportions prescribed above. (Tr. 4.)

Stated in another form, there shall be deducted from the revenue or proportion accruing under divisions to the trunk-line connections and added to the revenue or proportion of the Orient 15% for Abilene & Southern; 25% for (*a*) Atchison, Topeka & Santa Fe, (*b*) Galveston, Harrisburg & San Antonio, and (*c*) Wichita Falls & Northwestern; 20% for (*a*) Chicago, Rock Island & Pacific, (*b*) Midland Valley, (*c*) Missouri, Kansas & Texas, (*d*) Missouri Pacific, (*e*) St. Louis-San Francisco, (*f*) Texas & Pacific; 30% for (*a*) Fort Worth & Denver City and (*b*) Gulf, Colorado & Santa Fe; and 10% for Clinton & Oklahoma Western.

In an opinion concurred in by two members, covering 13 closely printed pages of the transcript (Tr. 35) the District Court in effect sustained the allegation of the bill (Tr. 5) "that the said order of the Commission was made without evidence to support it and that the record was entirely bare of any testimony or other proof that the divisions at that time * * * were in any way unfair or unreasonable or unduly preferential or prejudicial."

If, therefore, there is any evidence in the record to sustain the order the decree of the District Court should be reversed.

II.

THE TRANSPORTATION ACT.

The Transportation Act of 1920 is entitled "An act" (*a*) "to provide for the termination of Federal control * * *"; (*b*) "to provide for the settlement of disputes between carriers and their employees;" (*c*) "to further amend" the act to regulate commerce of 1887, as amended (41 Stat. 456), approved February 28, 1920. It consists of five titles, viz, I.—Definitions; II.—Termination of Federal control; III.—Disputes between carriers and their employees and subordinate officials; IV.—Amendments to interstate commerce act; V.—Miscellaneous provisions.

Inter alia, in order "to best promote the service in the interest of the public and the commerce of the people" (41 Stat. 476, 477); to "best meet the emergency and serve the public interest," * * *

"properly to serve the public" (41 Stat. 477); "that the public interest will be promoted" (41 Stat. 482); to consider "the transportation needs of the country" (41 Stat. 488); to meet the necessity of enlarging the facilities "in order to provide the people of the United States with adequate transportation" (41 Stat. 488); to enable the carriers "properly to meet the transportation needs of the public" (41 Stat. 491), the Congress of the United States, in enacting the Transportation Act of 1920, proceeded along comprehensive lines.

It is readily observable that the so-called "divisions paragraph" adds power to the Commission to fix the divisions as between the carriers commensurate with the power granted to the Commission under all of the other sections, all to the end that an adequate system of transportation may be provided.

The Transportation Act of 1920 provides (C. 91, 41 Stat. 474, 475):

> SECTION 400. The first four paragraphs of section 1 of the interstate commerce act, as such paragraphs appear in section 7 of the Commerce Court act, are hereby amended to read as follows:
>
> * * * * *
>
> (4) It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to pro-

vide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

The Transportation Act of 1920 further provides (C. 91, 41 Stat. 484, 486):

SECTION 418. The first four paragraphs of section 15 of the interstate commerce act are hereby amended to read as follows:

* * * * *

(6) Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or

inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstances which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

III.

THE EVIDENCE.

The Kansas City, Mexico & Orient line extends from Wichita, Kansas, to Alpine, Texas, 737 miles. (Tr. 10.) Construction of the line in Mexico was commenced in 1901 and has been completed in parts.

That line, however, is not involved in this proceeding, which concerns only the mileage in the United States. (Tr. 11.) The investment in road and equipment, less depreciation, as of December 31, 1921, is reported as $21,969,730.31. The Kansas City, Mexico & Orient Railway Company of Texas was organized July 5, 1899. The investment in road and equipment of that company, less depreciation, as of December 31, 1921, was reported as $6,878,360.62; the total for both companies being $28,848,090.93. For the years 1912 to 1921, inclusive, except for the years ended June 30, 1913, 1915, and 1916, the Orient System in the United States operated with increasing deficits. In 1922 these deficits amounted to, in January, $105,289.00; February, $59,432.00; March, $59,346.00; April, $116,539.00. (Tr. 12.)

The principal products originating on the line are livestock, cotton and grain, and other products of agriculture. The road operates through 4 counties in Kansas, 8 in Oklahoma, and 16 in Texas, serving 13 county seats, of which 5 are served exclusively. An estimated area of about 23,272 square miles, with a population of approximately 500,000, is served by this carrier, and the property value, exclusive of cities and towns, is placed at $204,250,000. (Tr. 13.) Between Wichita and Altus, Okla., there are grain elevators at all stations and in southern Oklahoma there are several cotton gins. At Hamlin, Texas, a cement-plaster mill is served exclusively by the Orient. There are no mining or lumbering activities along the line and the company is under the necessity of

purchasing all of its coal and ties at points off its line, resulting in increased expense on these items. (Tr. 13.)

The Orient is not primarily an originating carrier but a large proportion of its freight tonnage is handled as an intermediate carrier. Thus, for the years 1917 to 1921, inclusive, the total revenue freight carried averaged approximately 1,300,000 tons. (Tr. 13.) On the basis of one ton of freight moving for a distance of one mile, the figures for 1921 show 57,020,117 ton-miles originating on the Orient; 39,331,668 ton-miles delivered on the Orient; and 89,058,723 ton-miles intermediate. (Tr. 13.)

The Commission reiterated its previous finding "that the Orient System, or at least that part which lies within the United States, is of essential importance in meeting the transportation needs of the public in the territory which it serves." (Tr. 14.)

The Orient asked only a sufficient measure of relief to enable it to continue operations and made no request for a return upon investment. (Tr. 12.) It was claimed that the loss of revenue during the period of Federal control, which was far heavier than that for other years, was largely due to changes in the routing of traffic and that since the termination of Federal control the former conditions have not been restored. The record indicates that a substantial portion of the through traffic of the Orient was received from the Southern Pacific and that the latter reduced its deliveries on account of alleged unsatisfactory service of the Orient. (Tr. 12.) However,

no allegation of inefficient operation appears in the record against the Orient or any of the respondent connecting lines. (Tr. 14.)

According to its own estimate, the deficit of the Orient for 1922 will amount to $1,590,213.00. (Tr. 14.) For the year ended December 30, 1920, interest was accrued amounting to $311,526.65, of which only $17,622.95 was paid. For the year ended December 31, 1921, interest accrued amounting to $514,665.32, of which $150,000.00 was paid, this payment being applicable to a loan of $2,500,000.00 to the receiver under Section 210 of the Transportation Act of 1920. (Tr. 14.)

The purposes which the statute was designed to subserve were before the Commission continuously and in its report in the instant case the Commission observed "This provision has been considered by us heretofore." (Tr. 13), citing *Pittsburgh & W. Va. Ry. Co.* v. *P. & L. E. R. R. Co.*, 61 I. C. C. 272; *New England Divisions*, 66 I. C. C. 196. The Commission had already considered the so-called "equated ton-mile" rule. *Division of Joint Rates and Fares of M. & N. A. R. R. Co.*, 68 I. C. C. 47 (Tr. 13, 15). Counsel for the Commission define an "equated ton-mile" as a transportation unit derived by adding to the ton-miles of freight three times the number of passenger-miles; the passenger-miles are "equated" into ton-miles on the basis of three ton-miles to one passenger-mile.

Following a statement entitled "Comparison of Unit Revenues, and Return for Year Ended Decem-

ber 31, 1921" (Tr. 16), compiled from the annual reports on file with the Interstate Commerce Commission[3] of the Kansas City, Mexico & Orient and its 13 connections, the Commission found (Tr. 17):

> The gross revenue of the Orient per equated ton-mile is greater than that of nine of its connections, and its earnings per car-mile are substantially smaller than eleven of the thirteen connections, while the earnings per train-mile are in each instance materially less, thus evidencing a smaller and less profitable train and car load, the usual incident of a light traffic. The operating expenses per equated ton-mile are greater than those of any connection except two small roads, namely: Abilene & Southern and the Clinton & Oklahoma Western, and its expenses per car-mile are substantially greater than those of the nine larger roads, while the expenses per train-mile are in six instances materially less. The general result is that while the Orient sustained a deficit in its net railway operating income of sixty-nine cents per train-mile, all of its connections received incomes ranging from thirty cents per train-mile in the case of the Galveston, Harrisburg & San Antonio, to $1.84

[3] All the judges sitting in the District Court treated the exhibits as data made up from the annual reports of the carriers on file with the Commission. Circuit Judge Lewis (288 Fed. Rep. 112; Tr. 44, 45): "But taking the data extracted by the Commission from the annual reports and embodied in its opinion, their utilization was comparative—not self-probative of the ultimate fact, but supposedly a means to ascertain that fact." District Judge Kennedy (288 Fed. Rep. 116; Tr. 49): "The chief criticism is that the Commission considered the annual reports of the carriers themselves in arriving at their conclusions. These reports are filed with the Commission, and so far as the carrier is concerned are authentic and binding upon it."

per train-mile in the case of the Fort Worth & Denver City.

In other calculations the results as distinguished between freight and passenger traffic have been separately considered, based upon an allocation in accordance with our plan to include all operating revenue accounts. The operating ratios of the carriers concerned in respect of all revenue received show that the freight operating ratio is less than the passenger operating ratio with exception of the Atchison, Topeka & Santa Fe, Fort Worth & Denver City, St. Louis-San Francisco, and the Texas & Pacific, for which the freight ratio is higher. In the case of the Fort Worth & Denver City, Missouri, Kansas & Texas of Texas, and Midland Valley, the two ratios are substantially equal, which is also true of the combined result of the eleven major roads used in the calculations. It also appears that the freight ratio of the Orient (1.0791) is approximately 141 per cent of the average freight ratio of the other connecting lines (0.7663), while the passenger ratio of 1.3518 is approximately 175 per cent of the average passenger ratio of (0.7718) the eleven major connections.

The disparity of 41 per cent in the case of freight service and 75 per cent in the case of passenger service would seem to indicate that the passenger fares and freight rates and divisions accorded this carrier are not sufficient to meet even the maintenance, traffic, transportation, and general expenses properly to be charged against either the freight or passenger traffic, to say nothing of taxes, equipment

> rental, and a fair return on the property investment used in the service. As stated above, however, the Orient is seeking only such revenue as will enable it to operate the road, and is asking nothing for its security holders.

In compiling from the annual reports and considering the "equated ton-mile" figures the Commission was acting within its power.

It is observable the law requires that these annual reports shall be accurately compiled. There is not only forfeiture attached for failure to comply with the law but a severe penalty for false swearing. See Section 20, as amended, Appendix A.

Keeping before us at all times the fact that the Orient Company had "no friendly connections" and the charge that in many instances "where divisions have been established by its connections on an arbitrary basis these connections have declined to shrink their arbitraries when the through rates have been reduced" (Tr. 17), to save themselves the appellees are driven to the extreme of claiming that the material assembled and considered by the Commission taken from their annual reports was inadmissible.

The statute provides that these public records "shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; * * *." (App. 41.) By law, therefore, these annual reports and each and every one of them, or any part thereof, were always in evidence in any proceedings in which they were relevant. The rule

of the Interstate Commerce Commission cited by the District Court (Tr. 44) contains nothing to the contrary. It is a rule of convenience for the Commission and the parties and is not a rule which changes the statute or deprives the Commission of the right to consult records prepared and filed by the carriers under the statute.

Counsel emphasize the words of this Court in the footnote to the opinion in the *New England Divisions case*, 261 U. S. 198, viz: "Papers on the Commission files are not a part of the record in a case,—unless they are introduced as evidence." Under that holding they say that the figures compiled and considered by the Commission were inadmissible. The Court was discussing division sheets and further said: "It is the nature of the enquiry, not the accident whether papers are on file or published, which determine whether facts can be proved by evidence which is typical."

The charge in the bill is that the figures "were constructed by the Commission from matter which was not submitted in evidence before the Commission, which plaintiffs did not know was to be used, upon which they had no opportunity to cross-examine, and which matter was considered and treated by the Commission, as shown by its report, as relevant and material." (Tr. 8.)

It is noteworthy that they do not allege that the figures were erroneous; that any cross-examination with respect thereto would have shown anything

else; that they were in any manner prejudiced thereby, or that they would have offered other figures or evidence to counteract what the figures show and what such other figures and evidence are.

The learned District Court held (Tr. 45; 288 Fed. Rep. 102, 112) "that the annual reports and the data which they contain were not made a part of the record, and were not properly before the Commission for consideration in reaching its conclusion." After so holding the learned District Court proceeded, of its own motion, and on its own account, to consider the annual reports and the data which they contain or as compiled therefrom as insufficient evidence, or any evidence, to support the order of the Commission, thus substituting the judgment of the court for that of the Commission on whether (1) the annual reports were before the Commission and (2) the effect thereof. This was assigned as error. (Tr. 71.)

In Ex parte 74, *Increased Rates* 1920, 58 I. C. C. 220, these 13 connections and the other 37 trunk lines which constituted the 40 before the Commission, and which are located in the Western Group, were allowed an increase of 35% in freight rates. The footnotes in the Commission's report, "*Compiled by the Commission's Bureau of Statistics*," indicates that these carriers were entirely satisfied that the Commission should compile tables and statistics on which to base the 35% increase. Their dissatisfaction to the practice appears to show itself only when the Commission undertakes to distribute the

revenue by adjusting the divisions. 58 I. C. C. 234, 236, 238, etc.

Sound argument against the action of the District Court on that subject is the vigorous dissenting opinion of District Judge Kennedy. (Tr. 49; 288 Fed. Rep. 102, 116.)

Unfriendly to the Orient Company; declining to "shrink their arbitraries when the through rates have been reduced;" failing to offer any evidence, file briefs, or present oral arguments to the Commission; and without allegation in any form that the figures are incorrect or that they were in any way prejudiced thereby; and without any subsequent offer of proof either to the Commission or to the court to meet that which was taken from their annual reports which they had previously filed with the Commission in pursuance of the statute, it is submitted that the holding of the District Court sustaining the charge of the appellees cannot stand.

It is obvious that the course pursued by appellees was not to furnish evidence and enlighten the Commission on these divisions and the effect on the respondents of any increase to the Kansas City, Missouri & Orient, but only to discredit, as far as possible, the applicant's evidence, interpose objections to the proofs offered by it, offer none whatever on behalf of themselves, file no brief, make no argument, and take their chances against an adverse order. Under such circumstances their position in appealing to a court of equity and good conscience to enjoin an order alleged to be confiscatory of their property may not prevail.

IV.

PRODUCTION OF ALL OF THE DIVISION SHEETS WAS UNNECESSARY.

In the District Court the learned counsel argued that the Commission should have brought in all of the division sheets applying to all of the 13 connecting lines and the 10 defendants before the Commission as well. Their further contention that *all* carriers should have been made defendants before the Commission would have necessitated, if their arguments were sound, that *all* division sheets, covering *all* traffic, over *all* lines should have been offered and a hearing had thereon.

While the order is directed against the 13 connections of the Orient Company, it by no means follows that the 13 must stand all of the shrinkage. It is not to be assumed that such great systems as the Southern Pacific and the Santa Fe and others of the 13 will not require that their connections shall bear substantial parts of the shrinkage. The shrinkage of the divisions may well be distributed among all lines over which the traffic moves. Thus, if the freight charge is $400 on a carload of machinery carried from Akron, Ohio, to Clinton, Okla., divided B. & O. to St. Louis, $125; C. B. & Q. to Kansas City, $100; Santa Fe to Wichita, $100; and Orient to Clinton, $75; and the Santa Fe gives up 25% to the Orient, making the new divisions Orient $100 and Santa Fe $75, there is nothing in the order to prevent the Santa Fe and its other connections from readjusting their divisions on a new basis, say, Santa Fe,

$92.50; C. B. & Q., $92.50; and B. & O., $115, or on any other acceptable basis. The order dealt with divisions as they existed on August 9, 1922, and the increases were based on "the following percentages of *such* divisions" (Tr. 18). In giving directions with respect to the readjustment the Commission uses the words "*present* divisions" (Tr. 19). The procedure followed was similar to that followed in the *New England Divisions Case*, where the Hudson River was the basic line on which the increase of 15% to the New England lines was made. The lines both east and west of the Hudson were left free to work out their own subdivisions among themselves. In the instant case, as in that case, the Commission invited the connecting lines to come in again, in the event they could not agree (Tr. 19).

E. H. Shaufler, General Traffic Manager of the Orient System, with respect to Exhibit No. 14, "Map showing Division Groups east of the Mississippi River and west of El Paso, Texas," testified as follows (Com Rec. 118, 119):

> Examiner BURNSIDE. Proceed.
>
> The WITNESS. This has a bearing on divisions for the reason there may be some dispute as to the divisions in the handling of this traffic.
>
> Mr. BOYD. We now offer in evidence as Exhibit No. 14 a map showing the division groupings east of the Mississippi River and west of El Paso, Texas.
>
> Examiner BURNSIDE. It will be received as Exhibit No. 14.

(Thereupon the exhibit so offered and identified was received in evidence, marked "Applicant's Exhibit No. 14, Witness Shaufler," and the same is forwarded herewith.)

Mr. BOYD. Will you please explain this, Mr. Shaufler?

A. This map shows the grouping for division purposes east of Chicago and the Mississippi River and west of El Paso, Texas. If there is any detailed information desired for the subdivisions, we will have a witness to explain that.

Q. Now, you had better give a little more what that map does tell you.

A. It shows the per cents that apply from the Boston group to Chicago, both east and west, or it shows the per cents from the New York group to Chicago, east and west. It shows the per cents from the Pittsburgh group. I mean it shows the per cents from the Pittsburgh group to Chicago, east and west; and it shows the divisions Cincinnati-Detroit group to Chicago, both east and west. It shows the divisions west of El Paso to California. These divisions are only on transcontinental traffic. As I said before, if you want to know or if it is desired to know the subdivisions between Chicago and El Paso, we have a witness who will be available.

Mr. ROBERTS. I don't care for that, but I would like to have a copy of the exhibit.

Mr. THOMPSON. The Texas & Pacific participates very much in transcontinental traffic, and I would like to have a copy of the exhibit.

Mr. BOYD. I will undertake to furnish copies.

> Examiner BURNSIDE. If you are not supplied with copies of the exhibits you desire, just leave your name and the roads you represent and we will try to have you supplied.

Mr. Roberts, who stated that he did not care "to know the subdivisions between Chicago and El Paso" appeared on behalf of the St. Louis–San Francisco Railway. (Com. Rec. 70.) The thirteen respondents before the Commission have filed a joint bill for injunction to which Mr. Roberts and Mr. Norton have both subscribed their names as solicitors for all plaintiffs. It may be assumed that they also represented all of the respondents before the Commission, as but very few of the counsel who entered their appearances spoke before the Commission. If that is not true, then none of the respondents before the Commission other than the Southern Pacific lines is entitled to any alleged benefit from the objections interposed to evidence of the witnesses for the Orient Company; or to their cross-examination by Mr. Fred H. Wood who entered an appearance before the Commission for the Southern Pacific lines only, but who appears for all of the companies in the petition for injunction.

Counsel should not be allowed jointly to claim the benefit of matters before the Commission which aid their case before the court and then disclaim that they acted jointly before the Commission when some one of them spoke respecting matters which appear not to support their case before the court. They should not be allowed to claim that they stood united before

the Commission on the cross-examination and objections to evidence made by *one* of their number and that they stood disunited and scattered when one of their number declined to accept the offer of the witness for the applicant to furnish the division sheets.

On this subject the Commission itself said (Tr. 19):

> If it shall be found that in special instances the divisions herein prescribed operate unjustly, inequitably, or otherwise unreasonably to the injury of any carrier participating in a joint rate with the Orient, such situations may be called to our attention by appropriate proceedings and we will afford such relief as we may find warranted.

Moreover, in *New England Divisions Case*, 261 U. S. 184, 199, this Court, speaking through Mr. Justice Brandeis, said:

> That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions, *Mobile, Jackson and Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; and shift the burden of proof, *Minneapolis & St. Louis R. R. Co.* v. *Railroad and Warehouse Commission*, 193 U. S. 53. It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper

divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, serious injustice to any carrier could be avoided by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing.

V.

THE ORDER DOES NOT COMPEL THE STRONG RAILROADS TO SUPPORT THE WEAK.

The bill alleges (Tr. 6) that the Kansas City, Mexico & Orient is—

> * * * a railway system which was improvidently built and the construction of which would not be authorized to-day. * * *

In the District Court counsel for the plaintiffs (appellees here) filed a brief in which they argued that the order is—

> * * * an award of the Interstate Commerce Commission of money of the plaintiffs to two railway companies after they had defaulted in a loan of $2,500,000 of Government money made to them by the Commission. (Br. 1.)

And again:

> The theory of the Commission as it appears in the decision and order in this case (Kansas City, Mexico & Orient Division, 73 I. C. C.

319; bill p. 13) is that under the Transportation Act of 1920 it has authority to take up in its arms weakling railroads and nourish and support them out of the earnings of the stronger carriers. (Br. 3.)

And again:

> It is unnecessary to look to Russia to furnish startling motions of the distribution of the property of those who have among those who have not. * * * By a continuation of calculations incomprehensible to us this purely bolshevistic conclusion was reached. (Citing testimony of the witness Shaufler, Br. 21.)

And again:

> What put in the head of the Commission the hitherto unheard-of idea that Congress had in the language quoted vested in it a power clearly forbidden by the Constitution and thus far never exercised except in Mexico and Russia—that is too much even for our imagination. (Br. 50.)

In another brief separately filed in the District Court by counsel for the St. Louis-San Francisco Railroad Company the same alarming view was taken, thus:

> It was and will be said again that this *seizure of earnings* for the purpose of subsidizing the Orient was done "to foster public interest." A highwayman who takes my purse is nevertheless guilty of a crime, though he may unctiously announce that the contents are to be used for public charity. * * * The manner and method which the Com-

> mission adopted in seizing the earnings of the petitioners for the purpose of subsidizing the Orient conclusively demonstrate that the relative amount and cost of the service, respectively, under the joint rates were wholly ignored in determining the proportion of the joint revenue which the Orient should have.

These alarming views of the counsel which were orally argued with an excited fervor appear not to have been without effect on the minds of the concurring members of the learned District Court; for in holding the order null and void Circuit Judge Lewis said (288 Fed. Rep. 113; Tr. 46):

> The transportation act discloses no intention to vest the commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it. It exhibits a contrary purpose in section 422 adding section 15-a, to the Interstate Commerce Act because that policy would tend to bring all carriers to the same level in earnings and there would be no necessity for loans and no fund probably could be recovered for making them.

This view of the statute is not in accord with the opinions and judgments of the United States District Court and of this Court in the so-called *New England Divisions case*, 282 Fed. Rep. 306, affirmed 261 U. S. 184.

Both opinions in that case were before the District Court in this case. The only reference to the *New England Divisions case* in the opinion of the District

Court was to the footnote containing the words "Papers on the Commission files are not a part of the record in a case, unless they are introduced as evidence" (288 Fed. Rep. 115). Both opinions in the *New England Divisions case* were put out of the instant case with the statement "Neither side claims that the *New England Divisions case* is controlling or even helpful here." (288 Fed. Rep. 114.)

Quickly the counsel for the United States filed a petition for rehearing (Tr. 56) urging that "The opinion and judgment of the United States District Court for the Southern District of New York * * * and the opinion and judgment of the Supreme Court of the United States * * * which affirmed the judgment of the District Court, were not sufficiently considered." (Tr. 56.)

That counsel for the Government did rely on the two opinions in the *New England Divisions case,* both of which were before the District Court in the instant case, is shown by court documents on file with the District Court and set forth in the Government's petition for rehearing thus (Tr. 57):

> The sentence "Neither side claims that the *New England Divisions case* (66 I. C. C. 196, 282 Fed. 306) is controlling or even helpful here" is not sustained by the documents in the record.
>
> On the hearing of the application for temporary injunction, September 30, 1922, the main argument of counsel for the United States in opposition to the application was that the opinion of the District Court, South-

ern District of New York (Circuit Judges Hough, Manton, and Mayor all concurring), was persuasive against the plaintiffs in the instant case; and the fact was mentioned and emphasized that while plaintiffs in this case, on that hearing, had filed a brief of 72 printed pages they studiously avoided any reference thereto. The transcript of the stenographer's notes will disclose that counsel for the Government read at almost undue length from Circuit Judge Manton's opinion on both hearings.

The statement by this court that "Neither side claims that the *New England Divisions case* is controlling or even helpful here" was certainly not the impression of counsel for the plaintiffs, who, in their elaborate brief on the final hearing, reviewed at length the stenographer's notes of the argument previously made by counsel for the United States, with respect to which they say (p. 54):

"In the New England case, *upon which counsel for the United States relied in oral argument* (Argument, p. 84) *and upon which we rely even more confidently*, the Commission showed in its decision much evidence, and the United States District Court supported its order because there was so much well-considered evidence in the record that the order could not be held arbitrary."

Moreover, after two oral arguments at the Bar the Court generously allowed counsel for the United States to file a short brief. Point VI, the last paragraph, is as follows:

"The opinion of the District Court for the Southern District of New York (Circuit Judges

> Hough, Manton, and Mayer) is confirmatory of all that the Commission did in the instant case. *Akron, Canton & Youngstown Railway Co. v. United States*, 282 Fed. Rep. 306.
>
> The preliminary injunction should be dissolved and the bill should be dismissed."

The final hearing was held at Denver, November 27, 1922. The appeal in *The New England Divisions case* was not argued before the Supreme Court of the United States until January 11, 1923. The final opinion and judgment of this Court was announced on February 19, 1923, or more than two months after the instant case was argued and submitted. While both the main opinion and the dissenting opinion in the instant case indicate that the opinion of this Court was before the District Court when it decided this case, it could not well be said that "Neither side claims that the *New England Divisions case* is controlling or even helpful here," as neither side was ever heard on the subject after this Court decided that case.

It is respectfully submitted that the opinion of the Court neither correctly states the argument of counsel nor gives sufficient consideration to the opinion of the this Court in *The New England Divisions cases*.

Moreover, one day after the permanent injunction was issued in the instant case, the United States District Court for the Eastern District of Texas (Circuit Judges Walker and King and District Judge Foster) sustained the so-called "Recapture Clauses"

in case *Dayton Goose-Creek Railway Co.* v. *United States*, 287 Fed. Rep. 728. That opinion was also cited to the District Court in the petition for rehearing without avail.

In answer to the petition for rehearing the carriers conceded that the counsel for the Government relied on the opinions in the *New England Divisions case* and the opinion of the District Court in the *Dayton Goose-Creek case*. Indeed, in answer to the statement of the District Court that neither side relied on the opinions in the *New England Divisions case*, counsel for the carriers in the instant case stated "we relied upon it even more confidently than counsel for the Government did, not as decisive of any legal question before this court, but as illustrating that the Commission knew perfectly well how to try a division case." (Tr. 64.)

In the *New England Divisions case* the argument was advanced that the order was in the nature of a division of property and a transfer of money. In the *Recapture Clause case* the argument of the nineteen *amici curiae* was that the effect of the "recapture clauses" was "income-appropriation." In the instant case appellees argue that the order is "a seizure of earnings" and "an award of money," all based on the alleged erroneous principle that the Transportation Act was so designed as that the strong shall carry the weak.

These arguments were so overwhelmingly and conclusively rejected in the *New England Divisions case* and the *Recapture Clause case* as to dispense

with further argument on the subject. In both of those great opinions the needs of the weaker lines were recognized expressly and in the latter case the Chief Justice said "The recapture clauses are thus the key provision of the whole plan."

VI.

CONCLUSION.

The evidence was adequate to sustain the order. The final decree should be reversed with directions to the District Court to dismiss the bill for want of equity.

JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
CLIFFORD HISTED,
Special Assistant to the Attorney General.

APPENDIX A.

Section 20 of the Act to Regulate Commerce, approved February 4, 1887 (Ch. 104, 24 Stat. 379, 386) provided:

"That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Com-

mission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept."

Section 7 of the Act to Regulate Commerce, approved June 29, 1906 (Ch. 3591, 34 Stat. 584, 593) provided:

"That section twenty of said Act be amended so as to read as follows:

"'SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improve-

ments; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

"'Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filling the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority

to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

" 'Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

" 'The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

" 'The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

" 'In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its

authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

" 'Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

" 'Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

" 'That the circuit and district courts of the United States shall have jurisdiction, upon the application of

the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.' "

Paragraph (7) of the Act approved June 29, 1906, was amended by the Act approved February 25, 1909 (Ch. 193, 35 Stat. 648, 649), so as to read as follows:

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

Section 14 of the Act entitled "An Act to create a Commerce Court," etc., approved June 18, 1910 (Ch. 309, 36 Stat. 539, 555), provided as follows:

"That section twenty of said Act to regulate commerce, as heretofore amended, is hereby amended by striking out the following paragraph:

"'Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the commission it shall be subject to the forfeitures last above provided.'

"And by inserting in lieu of the paragraph so stricken out the following:

"'Said detailed reports shall contain all of the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or

on the thirty-first day of December in each year if the commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided.'"

Section 435 of the Transportation Act of 1920 amended the fifth paragraph of section 20 of the

Act to regulate commerce as follows (Ch. 91, 41 Stat. 456, 493, 494):

"The fifth paragraph of section 20 of the Interstate Commerce Act is hereby amended to read as follows:

"'(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or here-

after existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. The provisions of this section shall also apply to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this Act.'"

Paragraph (13) of Section 16 of the Act to Regulate Commerce (renumbered, Ch. 91, 41 Stat. 492), as amended by Section 13 of the Act approved June 18, 1910, entitled "An Act to create a Commerce Court," etc. (Ch. 309, 36 Stat. 539, 555), provides:

"The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the com-

mission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals."

○

Orient Divisions Case.

No. 456.

In the

Supreme Court of the United States

October Term, 1923.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants,*

vs.

ABILENE & SOUTHERN RAILWAY COMPANY, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL.

BRIEF AND ARGUMENT

on Behalf of William T. Kemper, Receiver of the Kansas City, Mexico & Orient Railroad Company and Kansas City, Mexico and Orient Railway Company of Texas, Interveners.

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INTRODUCTION.

This case grows out of an order of the Interstate Commerce Commission which granted to the Kansas City, Mexico & Orient Railroad (William T. Kemper, Receiver), and the Kansas City,

Mexico & Orient Railway of Texas an increase in the divisions of through rates, fares and charges, under Section 15(6) of the Interstate Commerce Act. These railroads are under one management and constitute the Orient System. They are referred to throughout the proceedings as the Orient and will be so designated in this brief and argument. The Orient is the vitally interested party in this case. It was an intervener in the court below, filed an intervening answer and participated in the hearing in the case below, and is a party in this proceeding by service and acceptance of notice of appeal.

We could add nothing to the discussion of the Transportation Act as applied to the facts in this case contained in the able briefs for the United States and for the Interstate Commerce Commission. We, therefore, will confine ourselves chiefly to an argument and discussion of the facts.

We believe that we can demonstrate that there was ample evidence to sustain the order of the Interstate Commerce Commission. While this, as we understand, is the full length to which the Court will go in its review, we, nonetheless, invite the fullest consideration of the correctness of the opinion of the Commission upon the facts produced, because we contend that not only was there before the Commission abundant testimony to sustain its order, but that its judgment was manifestly just and right and the only one that could have been properly entered under all the facts and circumstances of the case.

I.

The Court Erred in Respect to the Degree of Proof and the Definiteness of the Finding Required to be Made by the Commission.

The view of the court below was that the order must be founded upon a definite finding of fact to be made by the Commission and that this finding must be supported by evidence.

We will presently show that this requirement is met by the proof which was before the Commission, but, nonetheless, we advance the proposition that the lower court takes an extreme view of the burden resting upon the Commission and its view involves a misconception of the requirement of the statute. It is certainly not the letter of the law which reads:

> "Whenever, after full hearing, upon complaint or upon its initiative, the Commission is of opinion," etc.

Neither is the court's view within the spirit of the statute.

The statute deals with an administrative body confronted with the problem of so administering the railroad revenues "paid by the community" in such manner as will promote the fundamental purpose of the statute, to-wit, to enable the carriers "properly to meet the transportation needs of the public."

In the very nature of things, this delicate and important task involves the exercise of sound judgment and discretion to a peculiar degree—

first in respect to the existing basis of division of rates; and second, in respect to changes to be made in such basis. In contrast, a judicial inquiry presents a very different situation. A court is dealing with definite facts. They have already occurred and are of a positive character. They are capable of demonstration by proof and of being found as findings of fact from the proof adduced. But there is no such analogy here. The analogy, rather, is to the power exerted by the Commission in a revision of rates. The Commission reaches a conclusion that there should be a change in rates. It reaches this opinion from consideration of many facts and circumstances. It is the conclusion of a body skilled and experienced in rate structures. It is an expert opinion, to be sure. But, it is an opinion nonetheless. It is not required that this opinion should possess the attributes of a finding, as that word is customarily employed, and the correctness of which can be tried by the usual tests of evidence. "Opinion" and "finding" are not synonymous words.

> "Opinion—A judgment formed or a conclusion reached; especially, a judgment formed on evidence that does not produce knowledge or certainty."
>
> Synonyms are "belief, conviction, etc."
>
> "Finding—That which is found by observation or search; especially, in law, a statement of a conclusion arrived at by the judicial trial of an issue."
>
> The Century Dictionary, Revised and Enlarged Edition.

There must enter into each, conditions and considerations which do not necessarily form any part of the other.

The law does not require the Commission's opinion to be infallible, nor to guarantee that the remedy which it prescribes to correct the conditions which it finds shall be an absolute cure. Good faith and the exercise of sound judgment in arriving at an opinion and in applying a remedy are all that are required. The conception of the law by the court below would make the Transportation Act unworkable. Every order of the Commission could be subjected to the test of strict rules of evidence and the law itself defeated.

So, in the instant case, the opinion reached by the Commission concerning the existing divisions need not have been bottomed on facts ascertained with all the definiteness and precision involved in a judicial hearing. The Commission had the right to conclude that the existing basis of divisions between the Orient and its connections was "unjust, unreasonable, inequitable or unduly preferential or prejudicial" to the Orient from facts and circumstances which need not necessarily have been sufficient to warrant a positive finding of fact in that regard as might have been required in a judicial examination. Nonetheless, having on full hearing reached that opinion, it was the statutory right and duty of the Commission to carry that opinion to its logical conclusion by changing the divisions.

The statute gives positive expression to this distinction when all that it requires is two things, i. e., (1) full hearing; and (2) an opinion of the Commission.

It cannot be presumed that this language was used in the statute illadvisedly or without a purpose. If Congress had intended to require more than this from the Commission it would have said so. Indeed, this is the proper language to use when an administrative body is required to legislate for the future conduct of the parties. This is particularly manifest from the further consideration that at all times the matter is within the continuing control of that body. Unlike a judgment, which becomes fixed and unalterable, this decision can be changed at any time that the Commission on its own initiative, or upon complaint, finds either that its order should be modified or that subsequent changed conditions have rendered the remedy no longer appropriate, adequate or needful.

And so, in recognition of this fact, the Commission in its order expressly retains control and invites any carrier to apply to the Commission for relief "if it shall be found that in special instances the divisions herein prescribed operate unjustly, inequitably, or otherwise unreasonably to the injury of any carrier participating in a joint rate with the Orient."

II.

Preliminary Observations.

1. The hearing was on the initiative of the Commission. It was not upon formal issue joined. This is a distinction manifestly overlooked by the majority opinion in the court below.

In the opinion of the lower court it was said (p. 41 of the record):

> "It (Orient) was seeking relief and it suggested a plan which it believed would relieve its necessities. It made the record. The plaintiffs, aside from furnishing the statements showing the number of tons and ton-miles of freight transported on their lines and interchanged with the Orient for 1921 and the revenues therefor accruing to the Orient and to the respective plaintiffs, introduced no evidence. At the close of the proof introduced by the Orient the matter was submitted on the record without argument."

It is true that the Orient had suggested, in the statement which it filed with the Commission, a plan for adjusting divisions. That plan, however, was merely a suggestion. It was not adopted by the Commission and had no bearing, one way or another, upon the final result. The court, therefore, gives undue prominence by devoting more than three pages of its printed opinion to a discussion of a suggested plan which was never seriously considered at any stage of the proceeding by the Commission.

It is not correct to say that the Orient made the record (page 41, record). The Orient made no record in this case. The record was made by the Commission. Preliminary to the hearing, all of the carriers, including the Orient and the plaintiffs, were directed to prepare and present certain statistical data. At the hearing, all of them were invited to present whatever they had to offer, by way of evidence, argument, or otherwise, for or against the question of increased divisions.

The situation of the Orient, its operating conditions, its necessities, and all other matters germane to the subject, were not new to the Commission. It had theretofore gone into those subjects *in extenso* in connection with a prior application for a loan under Section 210 of the Transportation Act. The Commission availed itself of this knowledge and of the facts resulting from the investigation which it had made in that connection as embodied in its Finance Docket 3. Attention was called to this prior record and proceedings and the same constitutes part of the evidence in this case, although it is not included in the printed transcript of the record filed herein (see pp. 228, 229, Record A). However, two quotations from Commission's finding in the proceedings resulting in the loan are found in the record (pages 39, 40 and 56 of Record A).

2. This investigation was before an expert body peculiarly qualified to analyze the statistical data and evidence and to arrive at a correct opinion of and the correct answer to the technical

and special questions involved in the matter under investigation.

3. Ample advance notice of the investigation was given to the interested railroads and a full hearing was in fact held.

Note the order of April 3, 1922 (p. 63, Record A), setting the matter for hearing May 15th. The hearing commenced on May 15th at 9 a. m. and occupied until 1:10 p. m. the following day. There was full appearance and representation by all of the carriers concerned. Both oral and documentary evidence was used, the record comprising over 300 printed pages. The carriers fully cross-examined all the witnesses. Finally, after the Orient Railroad indicated that it had no further evidence to produce and the Commission had developed the facts so far as to it appeared sufficient, the other interested carriers were requested by the examiner to proceed, whereupon through their counsel they stated (p. 258):

> "Mr. Wood: Mr. Examiner, the respondents have no evidence to offer in this proceeding. They have been severally requested to furnish to the Commission certain statistical information, and I am prepared to file at this time responses to the Commission's request, so far as the figures have already been compiled by the respondents. I understand that the preparation of some of the figures has been somewhat delayed."

Here is presented the theory on which the complaining carriers, in this case, proceeded at the hearing. They evidently looked upon it as

though it were a lawsuit with the Orient as plaintiff, and the other carriers as defendants, and the Commission the judge. Being a judge, the Commission according to their theory, was confined strictly to the case made by the parties, and if it erred, appeal would lie by means of suit. This theory, we believe, is entirely erroneous and involves a misconception both of the nature of the investigation, the power and duty of the Commission and the duty of the carriers as well. The plaintiffs in the court below are in the attitude of asking a court of equity to help them out, because they misconceived the nature of the proceedings in which they were engaged before the Commission. The Commission was searching into the facts to determine how it should perform its duty under the mandate of the Transportation Act to keep this carrier in operation in the interest of the public. Increasing the divisions of existing rates was the method under consideration. It was the duty of these carriers to render every aid to the Commission which they could, by way of evidence or otherwise, which would throw any light upon the subject of inquiry and further the purpose in hand. It was not a proper discharge of that duty to assume the attitude of a defendant in litigation and, as it were, test the question by a demurrer to the evidence and then appeal to the court if their demurrer should be overruled.

III.

Analysis of the Evidence.

The statute itself in a broad and general way indicates the scope of the investigation and the general nature of the matters and things which are to be considered by the Commission in prescribing and determining the divisions of joint rates, fares and charges.

This record shows that every factor and element indicated by the statute as a basis for an opinion and order was met by the proof and received due consideration. Let us examine these various matters in the order indicated by the statute:

First.—The efficiency with which the Orient was operated.

This, of course, was an expert question. The Commission obviously had many methods by which it could determine that matter. There, moreover, has been no suggestion even, on the part of any carrier, either before the Commission or before the Circuit Judges, or at any other time or place, challenging the efficiency of the operation of the property. Consequently, the Commission very properly said in its report (Rec. p. 14):

> "No allegation of inefficient operation appears in the record against the Orient or of any of the respondent connecting lines."

Under the circumstances, the Commission was justified in accepting as true that the property was being efficiently operated.

Second.—The amount of revenue required to pay operating expenses, taxes, and a fair return on the railway property held for and used in the service of transportation.

We invite attention to the testimony of E. H. Shauffler, General Traffic Manager of the Orient Railroad, pages 74 *et seq.* of the Record A before the Commission, and to Exhibits 1, 2, 3, 4, 5 and 6 appearing at pages 264 to 273, Record A. This testimony and the exhibits show all of the foregoing factors and demonstrates, beyond doubt, that the Orient's revenues, from rates and existing divisions, were insufficient to pay its operating expenses and taxes—let alone anything by way of return upon the invested capital. So the Commission in its report found (p. 14):

> "The deficits in railway operating income for the years ended December 31, 1920 and 1921, have already been shown as $1,407,106.97 and $860,740.81 respectively. According to the estimate of the Orient, the deficit for 1922 will amount to $1,590,213. For the year ended December 31, 1920, interest was accrued amounting to $311,526.65 of which only $17,622.95 was paid. For the year ended December 31, 1921, interest accruals amounted to $514,665.32, of which $150,000 was paid, this payment being applicable to a loan of $2,500,000 to the Receiver of the Kansas City, Mexico & Orient Railroad Company under Section 210 of the Transportation Act of 1920."

The testimony shows various other efforts which were being made to help the situation,

among others being relief through the Labor Board by authority to reduce wages; another was making the Orient a differential line. Of course, neither of these were under the control of the Commission and differential rates could be put into effect only by cooperation of the carriers affected. These various matters are referred to in the report of the Commission (Rec. p. 14). So that it was accepted in the court below and will, without question, be conceded here, that it did become imperatively necessary that the Orient should increase its revenues.

And here we emphasize a most important point: That at no time has the Orient asked for the full statutory measure of increase in divisions which might have been awarded to it under subdivision 6 of Section 15. All it has asked and all that the Commission has attempted to secure to this railroad is such additional revenues as will enable it safely to maintain the property and continue its operation in the public service. (See Record pp. 12 and 17, also Record A, p. 123.) Nothing beyond this was asked at the hearing and nothing more is asked now. Notwithstanding the fact that upwards of $29,000,000 have been invested in the property in the United States, neither those investors nor the Receiver are expecting to realize anything at this time from operation of the property applicable to dividends or income. In that respect they are content to forego their just demands. They do feel, however, in the public interest, that a railroad determined by the Interstate Commerce Commission to be an essential

railroad shall be permitted in the proper exercise of the powers of the Interstate Commerce Commission to realize such income from the business which it transports as will enable it to live and continue to perform its public duties.

Third.—The importance to the public of the transportation service of such carrier.

This proposition was fully developed at the hearing and permeates this record. Briefly stated, this testimony shows that The Kansas City, Mexico & Orient Railroad System was originally designed to extend from Kansas City, Missouri, through the states of Kansas, Oklahoma and Texas, and thence through the Republic of Mexico to the Pacific Ocean at Topolobampo—a distance of 1659 miles. 967 miles of the road, or approximately two-thirds of the line, have been completed and are in operation, 737 miles of which are in the United States extending from Wichita, Kansas, to Alpine, Texas. That portion of the System in the United States operated jointly by the Receiver of The Kansas City, Mexico & Orient Railroad in Kansas and Oklahoma and, in Texas, by the subsidiary corporation, the Kansas City, Mexico & Orient Railway Company of Texas, and both called herein the "Orient System," operated under a single management, is the matter of concern in this hearing. It was in reference to the needs of the System solely in the United States that the inquiry under consideration was directed. This 737 miles connects at Wichita, Kansas, with four trunk lines, the Missouri Pacific, Santa Fe, Rock Island and Frisco and at Alpine, Texas, with

the Southern Pacific System. It also forms connections with all of the other railroads, plaintiffs, in this proceeding.

The railroad was projected about 1901. Its completion was arrested by the revolution in Mexico; and the troublous times, in that Republic, ever since have been a deterrent factor in completing the enterprise. Meanwhile, following the building of the road in the United States, was the development of its territory, presenting the spectacle of change from open to closed and fenced cattle ranges, in turn supplanted by farms and still smaller individual holdings, great increase in both suburban and rural population, and the usual accompaniments familiar to all, in the development of pioneer country. Although the Orient is yet a pioneer in the United States, nonetheless the testimony and maps graphically show the absolute and sole dependence upon it by large sections of the country. While a small portion of its mileage is paralleled by other lines in Kansas and Oklahoma (most of which followed the Orient in construction), in Texas it traverses a large otherwise unoccupied territory all of which is devoted to diversified farming and cattle raising, which includes grain of all classes, broom corn, alfalfa, cotton, kaffir, cattle, horses, sheep, goats, etc. Supported by this great agricultural and stock territory are 109 towns and villages, a number of which are county seats located along the line of the road, 85 of which are served exclusively by it. This settlement which has been brought about, and the development and prosperity which they

are enjoying and hope to continue, are founded upon this utility. While some effort is made in the record, it would be difficult to estimate with any degree of accuracy the millions of dollars which have been added to the wealth of that large section of the country which is thus dependent upon the road and which have been created by its existence.

In passing upon its application for a loan under Section 210 of the Transportation Act, the Interstate Commerce Commission had investigated the importance and necessity of the Orient System as an agency of public welfare, and in its report in connection with that loan it said:

> "Great interest in these applications was manifested by the communities served by the Orient lines. This concern was evidently the result of a widespread fear that if the loan should not be granted, operation of the Orient might be abandoned. It is not disputed that the Orient System, or at least that part which lies within the United States, is of essential importance in meeting the transportation needs of the public in the territory which it serves." (pp. 39, 40, 228 and 229 of Record A.)

As further showing that the Commission realized the importance of enabling the Orient to continue in operation we quote the following concluding portion of its report in the pending matter (Record, pp. 19 and 20).

> "At a conference of representatives of the states in which the Orient operates, and of

connecting carriers, held since this case has been submitted, the official delegate from Texas stated that a large number of counties in his state had expressed their willingness to assess the Orient for taxation purposes at the nominal value of $100.00 per mile. We believe that the other states should follow the lead of Texas in this respect; in fact, complete exemption from all taxes until the Orient can earn something is demanded in the public interest. We earnestly recommend this course to the respective state authorities.

It should also be stated that through the proper channels steps have been taken to route Government freight over the Orient as far as practicable."

It may be thought that we are giving undue prominence to this feature of the case. The justification, however, lies in the fact that throughout the proceeding before the Commission the burden of such defense as the railroads offered through cross-examination of witnesses and statements and innuendoes during the hearing was that the Orient Railroad ought not to have been built, but that having been built, it should be suffered incontinently to perish from off the face of the earth. What counsel would do with the wealth created in the country tributary to the Orient in consequence of its existence, to say nothing of what they would do with the thousands of people whose every hope is staked upon the continuance of the Orient, was not vouchsafed by them and remains a mystery to us.

Considered in the light of its mileage—737 miles—and the vast stretches of country which are

solely dependent upon it, the Orient System in the United States presents a unique situation, without parallel in any other part of the United States or in connection with any other railroad. It challenges, to a peculiar degree, the efficacy of the measures provided in the Transportation Act 1920 to preserve and maintain a transportation system for the people of this country. The Orient's property, its demands and needs for revenues, of course, were utilized to the Nth power by these complaining carriers in securing the rate advance, *ex parte* 74, but now those same carriers throw every obstacle within their power against the effort of the Commission to carry *ex parte* 74 to its logical and destined purpose under the Transportation Act, by securing to each carrier such fair and just division of rates as is needed to maintain the property in operation.

Fourth.—The status of participating carriers as originating, intermediate or delivering lines.

The proof shows that all of the railroads affected by the order come within each of the foregoing categories.

Fifth.—Any other fact or circumstance which would ordinarily without regard to the mileage haul entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

This is a very broad and general condition, leaving, as it manifestly should, very largely to the discretion of the Commission, what particular facts and circumstances should be embraced within

the inquiry, and how they should be ascertained. The record of the investigation conducted by the Commission shows that it approached the problem in the broadest way possible, and developed at the hearing and during the course of its investigation, every circumstance, condition or situation which might throw any light upon the subject of inquiry. Examining some of these matters in detail, it is to be observed:

Exceptional Conditions Affecting the Orient.

1. The Orient System in the United States labors under a number of disadvantages when compared with its connections. For example, as the record shows, there is no timber or coal located on the Orient from which it could obtain ties or fuel. Exhibit No. 6 (page 273 of the Record A) shows that this circumstance alone resulted in freight payments by the Orient in 1921 on fuel, ties and material necessarily brought to its own line for use and consumption amounting to $350,155.12. Indeed, in a sense, the Orient was a victim as well as a beneficiary of the increased rates granted in *ex parte* 74. It is also true that there are no factories on the line of the railroad which manufacture material required in the operation of the property, so that all of those items again have to be transported on to the property at increased cost.

The territory served by the Orient is not adapted to finishing cattle, which results practically in a one-way movement of such freight.

This circumstance means that for every car of loaded cattle an empty car must in the first instance have been transported over the line to receive the freight. The evidence shows that 50 per cent of the cattle, moving on the Orient line, are shipped on the lower ordinary or stock cattle rate, rather than the higher beef cattle rates.

Perhaps we cannot better cover these exceptional conditions than by quoting from the traffic manager's testimony reduced to narrative form (Record A, pages 84 to 88):

> "Approximately 26 per cent of traffic moving on the Orient is live stock. In the furnishing of equipment there is always an empty car haul, and in order to get the equipment from the north to the south it is in most cases necessary to handle the empty equipment approximately 700 miles, which makes the per diem an average of $12.00 per car, which makes the operation expensive to the Orient. The bedding of stock cars is an enormous item, which is not nearly covered by the charge. The Orient is obliged to maintain feeding and resting pens in Texas, Oklahoma and Kansas, which increases switching expenses and overtime for trainmen. The empty haul movement is approximately 100 per cent of the cattle movement. The cattle movement is to the north and east. About 50 per cent move on the fat cattle rate and 50 per cent on the stock cattle rate. There is no local cattle movement on the Orient; it is delivered to some connection. The Orient handles about 80,000 bales of cotton annually. The unusual costs to the Orient from that movement is that cotton

> moving into compresses is handled in any quantities, the inbound loading is light, so that it is necessary to furnish another car for the movement from the compress. This makes the use of two cars in and one car out, or the movement of three cars for one load. The percentage of cotton as compared with the total traffic is greater with the Orient than with most railroads in that territory. The movement of grain on the Orient is about 25 per cent of its traffic. There is a heavy expense for the cooperage and light repairs on cars. In many cases we spend as high as $20.00 per car to make them fit for grain loading. There are no coal mines, timber or raw materials for supplies on the Orient. All fuel, materials and supplies necessarily must be purchased off the line, upon which we have to pay commercial freight rates."

The court below answered this evidence of exceptional conditions with the statement that

> "So far as the proof discloses, that may be true also of some or all of the plaintiffs." (Record, p. 47.)

An attempt to wipe out the evidence of these exceptional conditions by indulging in a presumption, nowhere supported by proof, or justified from anything in the record, does not meet the exigencies of this case. Neither does it recognize fairly the facts elicited by the Commission, nor the grounds upon which it had a right to found its order. We submit the court cannot ignore the testimony nor the conditions which the testimony created as applied to the Orient by a surmise that

other carriers may have similar or other operating problems or expenses. It cannot in one breath say that there is no testimony to support the Commission's order and then when the evidence is called to its attention treat it as contradicted by surmising the existence of rebuttal proof not produced. That course would not only be subversive of every principle of fairness and justice in any case, but would be particularly objectionable here because, in the first instance, it invades the exclusive province of the Commission to weigh the testimony and then seeks to overcome the admitted weight of such testimony, or, as in this case, the uncontradicted evidence.

The plaintiffs had the privilege to endeavor, at least, to combat this showing or to meet it in any other way they thought best, but they did not choose to do so. It is too late, after the hearing has been closed and he Commission has made its order, to suggest the existence of supposititious facts, which, if they had been produced, might have led to a different conclusion.

But, moreover, the suggestion of the lower court of the possible existence of exceptional conditions in respect to other carriers not only invades the province of the Commission, but begs the issue. If any other carrier is entitled to special treatment in the matter of its divisions under the provision of Clause 6 of Section 15 the way to relief is plain and open to it by application to the Commission under the statute. Not only is that true, but the Commission in its order invited any car-

rier so concerned to present its situation to the Commission for adjustment. (Record, p. 19.)

But, here, we see the court usurping the province of the Commission, and, in the absence of complaint and without the presentation of a single fact, concluding that some or all of the carriers (names not given) are entitled to special treatment with respect to division of their rates.

The evidence warranted the Commission in finding that the nature of the freight movement over the Orient line, the added burdens placed upon it and the other exceptional conditions adduced at the hearing rendered the existing divisions as a whole unfair, unreasonable and prejudicial, and that the Orient was entitled to a larger proportion of the freight rate than it was receiving.

But the state of mind of the learned judges who decided this case below is indicated in their observation that in an investigation determining division of existing rates

> "the controllng inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them." (Record, p. 47.)

They say (Record, p. 47):

> "So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates, some of the things named for consideration

> by the Commission have no relevancy to or weight in determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them."

Here is to be remarked the curious circumstance that the interpretation of the court below not only rejects every single element recited in the statute to be considered in revising divisions, but introduces as the sole and conclusive factor an element not even mentioned in the statute.

The opinion of this court in the New England Divisions case so completely demonstrates the erroneous conception of the law manifested by the court below that it would serve no purpose for us to further pursue the argument.

2. Another exceptional condition unfavorably prejudicial to the Orient System is the state in which it was left upon termination of Federal control. The proof shows that during Federal control all freight solicitation was abandoned and a large percentage of tonnage in which the Orient had previously participated as an intermediate carrier was handled via other lines and diverted from the Orient. Very little, if any, through business during Federal control, was handled over the Orient, except that it was utilized in hauling empties and non-revenue producing freight. When the property was returned to its owners it came with many attendant disadvantages and in much different condition than when it was turned

over to the Government. It had no corps of freight solicitors and had no friendly connections. Its former customers had been weaned away from it and it was compelled to begin the arduous process of building up its through business anew. All of the years of accumulated friendships and connections had been lost. This circumstance is adverted to by the Commission in its report. (Record, p. 12.)

3. Another burden unfairly placed upon the Orient was the refusal of its connections to adjust divisions based upon established arbitraries to meet rate reductions which went into legal effect after the division agreements had been made.

(See testimony of Mr. Lane, Record A, pp. 234, 235, 238 and 239.)

The Commission called attention to this circumstance in its report. (Record, p. 17.)

IV.

The Commission's Opinion and Order.

The Commission in its report, after a careful analysis of the operating figures and evidence, said (Record, p. 18):

> "It is apparent, however, that the Orient has not received and is not receiving the share of the revenue within the group in which it is included to which it is properly entitled on basis of the amount and character of service performed."

In its investigation and order the Commission dealt with the subject comprehensively. All of the carriers affected by the order are in the Western Rate Group and were all participants in the freight rate advance granted by the order in *ex parte* 74. As was said by one of our associates in his brief in the court below, the Commission did not attempt to fix particular divisions of individual rates, as such. The interchange traffic between the Orient and each plaintiff was considered as a unit; the Commission accorded blanket treatment to all divisions of all joint rates between the Orient and each plaintiff. The question decided was whether those joint rates, taken together, were on the whole reasonably and justly divided between the Orient and the plaintiff; that is to say, whether the aggregate revenue accruing to the Orient and the plaintiff from joint rates was fairly divided between them.

Continuing our argument, we call attention to the fact that the revenue and expenses of the Orient, as well as of all of the other carriers, were before the Commission. The investment in the Orient property and the amount of revenue required by it in order to pay its operating expenses are fully shown and are admittedly inadequate. Exhibit No. 16 (pages 294, 295 of Record A) shows the result of the Orient's revenues if present divisions were increased by certain percentages, using the revenues for 1921 as the basis.

With all of this evidence before it, it became a matter of expert judgment to apply the facts and work out a rule of such equitable and just

division of the rates as in the opinion of the Commission would secure in this case, particularly, the primary object of the Transportation Act, to-wit, the continuance of the Orient in transportation service.

As suggested in the New England Divisions case, suppose that the Commission had disposed of this matter of divisions at the time it granted the increase of rates to the plaintiffs in *ex parte* 74; that all had been contained in one order. Do not the facts of record in this case show that the Commission would have been justified in making the division of the rates that it has made? What single element would have been lacking as a necessary predicate to such order? If the rate increase and the divisions had been the subject of a single inquiry, there would have entered into the judgment of the Commission these primary considerations—on the one hand there were a group of prosperous carriers whose independent needs, alone considered, did not entitle them to anything like the advance in rates proposed, and who, if the matter was not controlled through divisions, would receive an unreasonably large return. On the other hand, was the Orient System suffering under exceptional conditions, sadly in need of revenue—to such an extent that it was imperative that it should be increased if it should continue to operate. What could or should the Commission have done in performance of its duty to insure adequate transportation service to the country dependent upon the Orient System? What was the just, reasonable and equitable thing to do?

The questions answer themselves, and yet, that is all there is to this case. The rule is no different, and the considerations are in no respect changed because the question of divisions of the rates came up for disposal subsequent to the time the rates were fixed.

V.

Statistical Information Before the Commission.

In its opinion the court below declares, in effect, that there is no testimony to support the Commission's order except "it can be gleaned from the exhibits." (See Record, p. 42.)

This statement in the opinion compels the observation that the court entirely overlooked the oral testimony comprising some 194 pages of the printed record and which we have, in a general way, outlined in the foregoing portion of our argument. In some respects this testimony was explanatory of exhibits. In other particulars it was new matter bringing to the attention of the Commission conditions and circumstances not shown by the exhibits at all, but all of which must be read in connection with and as forming a part of the whole case before the Commission.

Furthermore, the court below conceived that there were substantially only two exhibits worthy of consideration, namely: Exhibits 25 and 26. (See court's opinion, p. 43 of the Record.) The conclusive answer to this last observation is a brief digest of the statistical and account-

ing information contained in the voluminous record of exhibits appearing in Record A. During the presentation of these exhibits we shall point out many important matters ignored by the lower court in its consideration of the case, and further direct attention to the circumstance that its own analysis of Exhibits 25 and 26 involves a misconception of the facts and a grossly erroneous inference therefrom.

The record shows that the Commission had before it and considered in the problem certain statistical information which may be briefly recapitulated as follows:

1. Detailed statement of revenues and expenses of the Orient System for the year 1917 (prior to Federal control) 1920 (following Federal control), and for the year 1921, and the first three months of 1922.

(See Ex. 1, pp. 264-266 of Record A.)

2. Statement showing the approximate decreases in revenue for the year 1922 to be anticipated, due to reduction in rates which went into effect on January 1, 1922.

(See Ex. 2, p. 267, Record A.)

3. Statement similar to Exhibit 1 except that it shows allocation of revenues and expenses to freight and passenger service for the years 1920 and 1921.

(See Ex. 3, pp. 268, 269, Record A.)

4. Estimated revenue needs and expenses for the year 1922, showing a deficit to be anticipated of $1,740,213.

(See Ex. 4, pp. 270, 271, Record A.)

The Commission in reviewing this exhibit deducted the interest on the Government loan, $150,000, making the anticipated operating deficit $1,590,213. (See p. 14, Record.)

5. Statement showing a reduction in operating expenses which would follow a favorable action by the United States Railroad Labor Board on pending application by the Orient to reduce wages.

(See Ex. 5, p. 272 Record A.)

6. Statement showing all fuel, ties, and store stock material purchased in 1921, freight charges and amount paid for freight in excess over 1917, due to increased freight rates, and also showing the total freight which the Orient was compelled to pay to transport these needed commodities to its use.

(See Ex. 6, p. 273, Record A.)

7. Statement showing loads originating on Orient lines and delivered to connections during 1921 by months. This also shows percentages which each one of the connections received of the total loads.

(See Ex. 7, pp. 274, 275, Record A.)

8. Statement showing total loaded cars received from connections in 1921.

(See Ex. 8, p. 276, Record A.)

9. Comparative statement of investment in road and equipment of the Orient System December 31, 1920, 1921.

(See Ex. 16, p. 290, Record A.)

10. Exhibit 17 (p. 291, Record A) is a compilation submitted to the Commission prepared from the Railway Age, February 25, 1922, which was taken from the annual reports filed by the Railroads with the Interstate Commerce Commission. The net operating income and deficit of 195 roads were analyzed. From this it appeared that 152 showed large operating income, that 43 show net deficit and that the deficit of the 43 could have been made up by taking slightly in excess of .02 per cent of the net earnings of the strong lines. This same calculation is carried forward with reference to the 39 roads who were originally respondents to the April 3rd, 1922, order of the Commission.

The showing is again carried forward with respect to the plaintiffs in this case (omitting Abilene & Southern and Clinton and Oklahoma Western).

Note.—In the preparation of this table, the Gulf, Colorado & Santa Fe was considered part of the Santa Fe System and the Wichita

Falls and Northwestern was treated as part of the M. K. & T.

(See pp. 291, 292, 293, 378 to 387 inc., Record A, the latter pages being a detail of the exhibits.)

11. Exhibit 18 is a memorandum showing the effect of certain suggested percentage increases to the Orient freight revenues based upon the year 1921.

(See pp. 294, 295, Record A.)

12. Exhibit 19 (p. 296, Record A) is a statement showing current assets of the Orient System as of April 1, 1922, from which it will be observed that there was at that date net cash available $347,835.74. The auditor states there was to be considered the fact that during the previous three months the Orient sustained a deficit of $224,067.47. It is not strange that his prediction of continued operation under the circumstances was somewhat pessimistic. This was so apparent to the Commission itself that oral arguments and briefs were not insisted upon and the Commission proceeded with all expedition in rendering its opinion in the case. Record A, pp. 262, 263, shows that this was not a tentative report case, that counsel for both sides waived briefs, waived oral argument and submitted the case upon the record as made.

13. Exhibit 20 (p. 296, Record A) is a table of operating revenues, expenses and payrolls for the year ending December 31, 1921, and exhibiting

operating ratios, from which it will appear that the operating ratio of expense to revenues for the system was 111.63.

14. Exhibit 21 (pp. 298 to 311 inc., Record A) is the application which the Orient System filed and which started the investigation by the Commission.

15. Exhibit No. 22 (p. 312, Record A) (placed in the record by the plaintiff carriers) is a statement of railway operating revenues, expenses, and income of the Orient System for the years commencing with 1903 and ending with 1920.

16. Exhibit 24 (pp. 313 to 325, Record A) is a statement compiled by the Orient pursuant to the order of the Commission of April 3, 1922 (heretofore adverted to) showing ton miles, revenue and revenue per ton mile accruing to all parties from all forwarded traffic for the year 1921. (See pp. 313-317, Record A.) And a similar statement of traffic received by the Orient. (See pp. 317-322, Record A.) And a similar statement of intermediate traffic. (See pp. 322-325, Record A.)

17. Exhibit 25 (p. 326, Record A) is a recapitulation of freight delivered to connecting lines for the year 1921 and Exhibit 26 (p. 327, Record A) is a similar recapitulation of traffic received.

Exhibit 24 (Record A, p. 322) shows the traffic which the Orient handled as an intermediate carrier and the revenue of $887,611.83 which resulted to the Orient therefrom. In the preparation of Exhibit 25 it was necessary to include this

intermediate traffic because this traffic was delivered by the Orient to connecting lines.

In Exhibit 26 it was necessary to include this intermediate traffic because that traffic was delivered to the Orient by connecting lines. This resulted in the duplication of the revenues to the amount above named. This duplication in these exhibits was specifically shown by witness, Kelly, in his testimony before the Commission. (pp. 251, 252, Record A.) The failure to observe this led to a very serious error by the lower court as we shall presently point out.

18. Exhibits 27 to 42 inclusive (pp. 328 to 376, Record A) were submitted by the plaintiff carriers in compliance with Commission's order of April 3, and show the same information which the Orient's Exhibits 24, 25 and 26 heretofore referred to disclose, and corroborate the Orient's exhibits.

From Exhibits 25 to 42 inclusive is shown all of the revenue which accrued from interchange business and how it was divided among all interested plaintiff carriers.

The lower court said:

> "There is no evidence in the record as to what the divisions of tariffs between the plaintiffs or any of them, and the Orient were, unless those facts necessary as a basis to support the Commission's order can be gleaned from the exhibits." (p. 42, Record.)

If the court means by the foregoing to say that the division sheets were not in evidence, the

statement is true. Any implication, however, that the absence of the division sheets left any uncertainty as to the actual divisions of the revenues between the Orient and its connections is erroneous. The proof established in a much more satisfactory way the divisions between the carriers from interchange traffic than could possibly have been shown by the production of the division sheets—to say nothing of the enormous and useless accumulation of the record that such a production would have involved.

As we have pointed out, the Commission treated this problem in a comprehensive way. It looked to the ultimate result, the amount of revenue derived from the freight in its entirety and the amount respectively received by the participating carriers based upon the existing divisions.

Suppose, by way of illustration, that in addition to the data disclosed by these exhibits there had been produced

a—Every freight tariff.
b—Every way-bill.
c—Every division sheet showing the divisions of the joint rates in each tariff.

These would have added nothing whatever to the showing which has been made. It would have been surplusage pure and simple. The Commission could not have obtained any information from any or all of the foregoing three suggested items that was not expressly before it.

At the risk of seeming to belabor the argument, we observe that the division sheets are of no probative value in respect to the matter before the

Commission. What the Commission was interested in was the practical result, how the joint business between the Orient and its connections worked out in dollars and cents as applied to the traffic that was actually handled, not on a theoretical basis. Therefore, when they had before them the ultimate facts, why should the record be incumbered with the details that went to make up those ultimate facts?

19. In addition to all of the foregoing exhibits, there were before the Commission to aid them in their investigation the annual reports of the Orient and of each of the plaintiff carriers for the year 1921. Attention was called to these reports at the hearing. (See pp. 73, 74, Record A.)

Conclusion From Statistical Data.

It is obvious that the problem of weighing and considering this mass of testimony, determining what it establishes and what action should be taken on the opinion reached, involved expert knowledge to a peculiar and special degree. The Commission considered the evidence from many angles, applied numerous tests, none of them in and of itself perhaps decisive, but all of them directed to the same ultimate conclusion, to-wit, the fairness and justness of the divisions and the remedy which should be applied by the Commission on the facts so developed. The lower court properly observed:

> "We appreciate the fact that the ability of the Commission to make proper deductions

> and conclusions from statistics embodied in these exhibits, with which it is their duty to constantly deal, is far greater than ours." (Record, p. 44.)

The Commission employed several units of comparison developed, as it said in its report, from its previous experience in matters of this character. For example, an equated ton-mile and again car-mile unit, and still another unit represented by the train-mile. It is shown in its report how these are derived. The Commission recognized the fact that it was not dealing with an exact science because it says (p. 15 of the Record):

> "It is, of course, understood that the reduction of gross earnings or expenses to units of this character does not produce absolutely correct results, but where the same method is used in all cases the results afford a reasonable basis for comparison."

After an elaborate table compiled from this statistical information adverted to, the Commission in its report (p. 17 of the Record) makes the following observation:

> "The general result is that while the Orient sustained a deficit in its net railway operating income of 69c per train-mile, all of its connections received income ranging from 30c per train-mile in the case of Galveston, Harrisburg & San Antonio to $1.84 per train-mile in the case of the Fort Worth & Denver City."

Surely this demonstrates two things: First, that there was evidence before the Commission on which those skilled in that line of inquiry could make the findings adverted to; and, second, that there must have necessarily been inequality and injustice in the divisions inasmuch as the Orient was the only one that sustained a deficit.

But the Commission did not conclude its investigation at that point. It went farther and refers to other calculations. The record does not show what those calculations were and there is no such requirement, and we apprehend that it is no more incumbent upon the Commission to put upon the record its process of reasoning in all of its details than it is required from any other examining body to do such a thing. It is enough to say that it made calculations, and as a result of those calculations substantially confirmed the same result pointed out in the immediately preceding part of its report, the same result as shown on its tabulations.

In short, from whatever angle it viewed this evidence, and in whatever way it pursued its calculations, it invariably reached the same conclusion stated (page 17 of the Record) by it as follows:

> "The disparity of 41 per cent in the case of freight service and 75 per cent in the case of passenger service would seem to indicate that the passenger fares and freight rates and divisions accorded this carrier are not sufficient to meet even the maintenance, traffic, transportation and general expenses properly to be charged against either the freight or passenger traffic, to say nothing of taxes,

equipment rental and a fair return on the property investment used in the service. As stated above, however, the Orient is seeking only such revenue as will enable it to operate the road and is asking nothing for its security holders."

And finally, to conclude (p. 18 of the Record):

"It is apparent, however, that the Orient has not received and is not receiving the share of the revenue within the group in which it is included to which it is properly entitled on basis of the amount and character of service performed."

VI.

Analysis of the Evidence Made by the Court Below.

While recognizing the superior qualifications of the Commission to pass upon problems of this kind, and while disclaiming any purpose to review the weight of the testimony, nevertheless we submit that that is essentially just what the lower court did in this case. The court practically concludes that the deductions of the Commission from this admitted record are erroneous.

On page 43 of the record the court said:

"Comparing the rate per ton-mile received by the Orient with that received by all of the thirteen connecting carriers on all of their interchange business with the Orient for the year 1921, it appears that the rate to the Orient on that basis is slightly in excess of

> the average to all of the connecting carriers on the same basis; that is to say, the Orient received .0147c per ton-mile, while the average received by all of the thirteen connecting carriers was .012c."

The point which the court then makes as established by the foregoing statement is:

> "It received a higher ton-mile rate, both on traffic which it originated and also on traffic delivered to it by plaintiffs, than they received. Its ton-miles were less than the ton-miles of all of the plaintiffs in 1921 on the interchange traffic, and yet it received for its services $635,000.00 more than the total received by plaintiffs."

The figures stated by the court are not quoted from the record, but are the evident result of an independent calculation made by the court from the exhibits. Furthermore, it is shown to have been compiled by the court from two exhibits only, Exhibits 25 and 26. The evident method was to consolidate the totals of the two exhibits and divide the ton-miles into revenue. This method of calculation, however, overlooked the fact that 89,058,723 ton-miles, $887,611.83, covering the intermediate traffic, was duplicated in the two statements. Exhibit 25, which covers traffic delivered to connecting lines, included traffic forwarded from points on the Orient as well as the intermediate traffic. Exhibit 26, which covered traffic received from connecting lines, includes traffic destined to points on the Orient line and

also the same intermediate traffic.

Had the court considered in this connection the testimony of witness Kelley, in explanation of these exhibits (Record A, pp. 251-252), it would have found that these exhibits contain a duplication of Orient revenues, and the reason therefor, as applied to intermediate traffic. It would have found that the intermediate traffic revenues which are duplicated amount to $887,611.83, and that instead of the Orient receiving from this interchange business $634,841.16 (which for brevity is stated by the court at $635,000) more than its connections, it received $252,770.67 less than its connections on this business.

The following tabulations make this clear:

CALCULATIONS AS MADE BY THE LOWER COURT.

	ORIENT			CONNECTING LINES		
	Ton-Mile	Revenues	Revenue per Ton-Mile	Ton-Mile	Revenues	Revenue per Ton-Mile
Exhibit No. 25. Traffic delivered to connecting lines, i. e., traffic forwarded from stations on the Orient and all intermediate traffic received from all connections	144,461,786	$2,295,582.36		161,566,199	$1,941,880.01	
Exhibit No. 26. Traffic received from connecting lines, i. e., traffic destined to stations on the Orient and all intermediate traffic delivered to all connections	132,300,975	$1,779,504.62		126,183,546	$1,498,365.81	
Total	276,762,711	$4,075,086.98	.01472	287,749,745	$3,440,245.82	.01196

Orient Revenue (court figures) $4,075,086.98
Connecting Lines Revenue (court figures) 3,440,245.82

Excess Revenue received by Orient, as per court figures ..... $ 634,841.16

CALCULATIONS SHOULD HAVE BEEN, WHEN MADE IN CONNECTION WITH TESTIMONY OF

(Record A, pages 251 and 252.)

	ORIENT			CONNECTING LINES		
	Ton-Mile	Revenues	Revenue per Ton-Mile	Ton-Mile	Revenues	Revenue per Ton-Mile
Exhibit No. 25. Traffic delivered to connecting lines, i. e., traffic forwarded from stations on the Orient and all intermediate traffic received from all connections	144,461,736	$2,295,582.36		161,566,199	$1,941,880.01	
Exhibit No. 26. Traffic received from connecting lines, i. e., traffic destined to stations on the Orient and all intermediate traffic delivered to all connections	132,300,975	$1,779,504.62		126,183,546	$1,498,365.81	
Total	276,762,711	$4,075,086.98		287,749,745	$3,440,245.82	
Deduct amount of intermediate traffic * (as shown in Exhibit 24, p. 322), which is duplicated in Exhibits 25 and 26	89,058,723	$ 887,611.83				
Net Total	187,703,988	$3,187,475.15	.01698	287,749,745	$3,440,245.82	.01196

Orient Revenue	$3,187,475.15
Connecting Lines Revenue	3,440,245.82
Excess Revenue received by Connecting Lines	$ 252,770.67

*By intermediate traffic is meant traffic originating on a line other than the Orient, destined to a line other than the Orient, the Orient performing a service from the junction at which received to the junction at which delivery is made to its connection.

The foregoing method of considering the proof was original with the lower court. It was not adopted by the Commission.

But the court says (Record, p. 43):

> "We think the record shows no better guide on that inquiry."

Curiously enough, therefore, the very method and calculation adopted by the court below vindicates the opinion of the Commission and the order increasing the divisions. But for the error in its figures due to the duplications of intermediate traffic pointed out, the calculations of the court on the per ton-mile rate demonstrate that the divisions to the Orient were unfair, unjust and unreasonable, and this from the two Exhibits 25 and 26 alone, explained by the oral testimony.

However, with much deference to the court, we suggest that the record does show a number of better guides to that inquiry pointed out by previous quotations by us from the report of the Commission. The Commission had no difficulty in weighing the testimony and determining from that testimony what the divisions were between the Orient and its connections and how each one was affected in dollars and cents and how the divisions worked to the disadvantage of the Orient, and the court would have confirmed that opinion if it had not committed a mathematical error in its calculations.

A careful reading of the opinion of the court below leads to this commentary—that whereas the opinion asserts that the order of the Commission

is not supported by any testimony, nonetheless, the opinion discloses the existence of testimony supporting every element contained in Clause 6 of Section 15 of the statute. But, under the interpretation of the court below, this evidence was entirely immaterial. The question comes down to the single issue in the language of the court "of the amount and cost of service to each of them" (p. 47).

In other words, the case stands admittedly here under the opinion of the lower court as having proven these factors:

1. That the Orient was efficiently operated.
2. The amount of revenue required to pay its operating expenses and taxes upon the property held for and used in the service of transportation.
3. The importance to the public of the continuance of this service.
4. That the Orient is an originating, intermediate and delivering line.
5. And generally, that the Orient was laboring under exceptional disadvantages, rendering the existing divisions *per se* "inequitable, unjust and unreasonable."

Because, forsooth, the Commission did not go outside of the section of the statute and develope an element no where prescribed, to-wit, the actual cost to the connecting lines in furnishing the joint transportation, the case must fail for want of proof. In prescribing this rule the court not only sets aside the plain language of the statute but imposes an obligation impossible to be met by proof. It must be obvious from a moment's

consideration, that it would be futile to undertake to so dissect the operating costs of the Santa Fe Railroad Company, for example, as to show even within appreciable limits, the cost of the joint service which it performs with the Orient in any single shipment. Such an allocation of of cost to each line on joint traffic is both a physical and accounting impossibility.

To illustrate: A Santa Fe train moving from Chicago to Wichita over the Santa Fe lines containing a car of freight destined to a point on the Orient lines would contain many cars of purely local freight, many cars of freight destined to other points on other railroads. So likewise the car moving over the Orient would be placed in a train containing cars moving between local points and to points destined to points located on other lines. To determine how much of the items which enter into the operating cost of the railroad is to be allocated to this particular car is an impossibility. Any such an allocation would be a mere guess and would be without probative value in any event. Similar illustrations of the impossibility of applying the rule laid down by the court as essential could be continued indefinitely.

VII.

As to the Use of Annual Reports.

The Commission made use of the annual reports of the plaintiffs, as well as of Orient in considering this case. The court below held:

> (a) "That the annual reports and the data which they contained were not made a part of the record and were not properly before the Commission for consideration in reaching its conclusion." (Record, p. 45.)

It also held:

> (b) "But taking the data extracted by the Commission from the annual reports and embodied in its opinion, their utilization was comparative—not self-probative of the ultimate fact, but supposedly a means to ascertain that fact." (See p. 45, Record.)

In other words, the lower court, in effect, held that the reports should not have been considered, but having been considered, they amounted to nothing, contained no evidence. The dissenting opinion of Judge Kennedy so completely answers both of the positions taken by the majority opinion below that but very little, if anything, should be added thereto. (See pp. 49-50, Record.)

Considering the objection further, however, in the order of the court's ruling:

a. It is not technically true that these reports were not before the Commission. On the contrary,

they were expressly before the Commission. We quote (Record A, from pages 73 and 74):

> "Examiner Burnside: I have no doubt it will be necessary to refer to the annual reports of all these carriers. Will it be understood at the outset that these reports may be referred to?
>
> Mr. Wood: If anything from the annual reports is to be considered in the case, it should be formally a part of the record by abstract or extract therefrom.
>
> Mr. Boyd: I only request that the Commission considered in evidence the reports on file of the respondents and of the carriers, and while they would be available to us, if we were to spend a great sum of money coming up here and getting the transcript of them, they are easily available to the Examiners and to the Commission.
>
> Examiner Burnside: The rules of practice of the Commission now effective, I think, provide that the annual reports may be used in evidence, and the requirement is that all matters which may be pertinent or which may be used in the case, be reproduced and furnished in exhibits, but that would be quite a burden, and I feel constrained to proceed under the rule of the Commission.
>
> Mr. Wood: The reporter will kindly note an exception on the part of the respondents to the consideration by the Commission of any matter in this case that is not formally incorporated in the record and made a part thereof and the contents of which are made the subject of cross-examination.
>
> Examiner Burnside: The exception will be noted."

The exception taken by counsel for the plaintiffs, is the plainest admission that the reports were admitted, otherwise there would have been no point to his exception and the noting of the exception by the Examiner confirmed this view.

Furthermore, the position of the counsel for the Orient plainly indicated that he regarded it of importance to the case that the Commission should consult these reports and if he and the others had not at that time understood that they were before the Commission, obviously there would have been some further reference to them in the way of proof before the conclusion of the hearing, or a further specific attempt to introduce them.

Furthermore, the ruling of the Examiner was in practical effect an interpretation of the rule of the Commission. The Commission, in other words, interprets the rule referred to one way—the court below interprets it another way. But whichever interpretation is correct the ultimate fact cannot be gainsaid, to-wit, that a ruling had been invoked, had been made adversely to the position of the plaintiffs and the reports were being considered and the attention of the plaintiffs was specifically challenged to that situation.

Thus far we have been considering this point as though this were an adversary proceeding in which the plaintiff was the Orient and the other carriers the defendants, and the Orient was making the case. This is the theory which permeates the entire opinion of the lower court, the error of which we have heretofore pointed out.

This proceeding was upon the initiative of the Commission. It was making an investigation. It called upon the Orient and the other carriers for facts and for data, but certainly it could not be confined in the performance of its duty to the limits which might be attempted to be set around it by the action of the parties under investigation. Its functions cannot be circumscribed in such a manner. Its prerogatives are as broad as the statute and as broad as the subject-matter of inquiry indicates they should be and the determination of the Commission of the extent and scope of the inquiry which it, itself, in pursuing must necessarily be conclusive upon everybody, and we see this theory completely borne out by the rule to which the court below adverted.

Quoting from the rule (p. 45 of the Record) as set out in the court's opinion:

> "(b) In case any portion of a tariff, report, circular, or other document on file with the Commission is offered in evidence, the party offering the same must give specific reference to the items or pages and lines thereof to be considered. The Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it or in annual, statistical and other official reports of the commission."

In other words, the sense of this rule is plainly that:

1. Where, in a strictly adversary proceeding before the Commission in which one of the parties

is making a record and assumes the burden of proof, it is incumbent upon such adverse party to bring to the attention of the Commission and on the record extracts from such reports as he thinks should be considered:

2. In an independent investigation initiated by the Commission it will take notice of annual reports without reference to them in the record or otherwise.

Therefore, these reports were incontestably before the Commission. They were considered by it and the court below finds in effect that the Commission committed error in so doing, and in misinterpretation of its own rule.

But here again, we submit, the court misconceives its judicial function in this case. It is not sitting as a court of error and review. Its duty is limited to an ascertainment of not whether the Commission correctly decided the case, nor whether it committed error in the admission of evidence or in the course of its decision, but whether there is any substantial evidence supporting the "opinion" which the Commission reached "on full hearing." So that, confessedly, there was before the Commission these reports. Whether they got there rightly or wrongly is entirely beside the point. They were there and no reviewing court could take them away from its consideration.

b. And this brings us to the second point made by the court—that the reports had no probative force.

It is difficult to understand just what the court below meant by that statement. It illustrates again the difference between the views of the Commission and the views of the lower court, first, as to what the subject of the inquiry was, and second, the conclusions to be drawn from the evidence produced.

The court below says that these reports furnished no basis for any conclusion, whatever. That they contain no evidence. The Commission, on the other hand, says that these reports furnish basic evidence, evidence that is of a very high degree, and from which the Commission as an expert body can deduce the matters and things set forth in its opinion. But surely this court is not going to follow counsel into a discussion of the merits of the controversy in this respect between the Commission and the lower court as to the weight and value to be given to the testimony.

Conclusion.

We respectfully submit that the judgment below was for the wrong party, that it should be reversed and remanded, with directions to dismiss the bill.

January 24, 1924.

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